No. 80-330

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED BEEF PACKERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the denial of its motion to quash a grand jury subpoena duces tecum was a final order that is appealable under 28 U.S.C. 1291.

1. A federal grand jury in the United States District Court for the Southern District of Florida is currently investigating transactions engaged in by petitioner, a wholesaler of meat. The investigation was prompted by the discovery of an altered medical certificate accompanying a shipment of hams which petitioner sold to a middleman, who then sent the shipment to Venezuela. The altered document inaccurately certified that the hams were boneless. The investigation was subsequently expanded to encompass other transactions in which petitioner engaged between January 1, 1977, and June 1, 1979.

On August 16, 1979, the grand jury issued a subpoena duces tecum directing petitioner to produce certain of its business records and office typewriters. Petitioner moved to quash the subpoena, and the motion was denied with respect to the business records. The court found that the subpoenaed documents were relevant to the investigation and that the subpoena was reasonably particular and not overbroad. The court quashed the portion of the subpoena that required the production of petitioner's typewriters (Pet. App. 1-3). The court thereafter granted the grand jury's written request to take type exemplars from the machines at petitioner's place of business (Pet. App. 4-5). Petitioner sought to appeal these two orders of the district court, but the court of appeals dismissed the appeal as interlocutory (Pet. App. 6).

2. a. The court of appeals correctly held that the district court's orders were not appealable. A court of appeals may review only "final decisions of the district courts." 28 U.S.C. 1291. This jurisdictional requirement, which precludes piecemeal review, "ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation" (*United States* v. *Nixon*, 418 U.S. 683, 690 (1974)); it also permits a grand jury to complete its investigation without unnecessary delay. As a general rule, therefore, "an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena *duces tecum* * * * is not final and hence not appealable." *United States* v. *Nixon*, *supra*, 418 U.S. at 690-691. Accord *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). Accordingly, this Court has " 'consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between

compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.' " *United States* v. *Nixon*, *supra*, 418 U.S. at 691,[1] quoting *United States* v. *Ryan*, *supra*, 402 U.S. at 533.

The Court has recognized only one general exception to the rule that a party must resist the order and be held in contempt before he may secure appellate review. When documents are subpoenaed from a third party who is unlikely to risk contempt, the owner of the documents may appeal immediately. *Perlman* v. *United States*, 247 U.S. 7 (1918). Clearly, that exception does not apply here. Petitioner is both the owner and the custodian of the documents at issue.

b. Petitioner's assertion (Pet. 15-16) of a conflict among the circuits is unpersuasive. Two of the three cases upon which petitioner relies involved the *Perlman* exception. See *United States* v. *Guterma*, 272 F. 2d 344 (2d Cir. 1959); *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956). In the third case, *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (7th Cir. 1956), parties who had complied with a grand jury subpoena sought an order to restrain the grand jury from turning over the subpoenaed documents to IRS agents for use in civil tax litigation. The parties did not challenge the grand jury's right to the documents, and there was no court order to resist. The parties could preserve their rights, therefore, only by appealing from

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[1]In *United States* v. *Nixon*, *supra*, the Court found a limited exception to the finality rule. The Court reasoned that, "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government" (*id.* at 691-692).

the order of the district court refusing to limit the grand jury's use of the documents to its own criminal investigation. Whatever the merits of that decision, the factors on which it relies for its finding of appealability are absent here.

Petitioner contends that only further delay will result from requiring it to be held in contempt before invoking the appellate process. As we have noted, this argument has been repeatedly rejected. See *United States* v. *Nixon*, *supra*; *United States* v. *Ryan*, *supra*. Any additional delay will be minimal. Moreover, the prospect of contempt will generally accelerate the grand jury investigation and any resulting criminal proceedings by discouraging persons who might otherwise resist the lawful process of the grand jury on frivolous grounds for purposes of delay.

Until petitioner resists the production order and is held in contempt, there is no final order from which it may appeal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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